ment of a debt incurred in the administration of the trust, such payment could not be deemed to be a breach of trust, regardless of whether the trustee was in default or not. Hence, a creditor receiving such a check, even with knowledge that the trustee owed the beneficiary on account of a separate and independent breach of trust, ought not to be required to refund the proceeds as money received by him from a trustee who had paid out in breach of trust. If, therefore, the trustee possesses such a power to pay the expenses of administration out of the trust funds, a judgment creditor should be entitled to have the benefit of the power. This reasoning would be equally applicable to tort creditors, whether the tort was committed by the agent of the trustee, or by the trustee himself. The practical result of such a doctrine would be that the burden of all expenses incidental to the administration of a trust would fall upon the trust fund itself, a solution which seems more just than that reached where a court measures the rights of a creditor against trust funds by the trustee's right of exoneration.[17]

Furthermore, if the right of the *cestui* against the trust fund is a right *in personam* against the trustee, and not a right *in rem,* or equitable property right,[18] it would seem feasible for equity to restrict this right in favor of those who have in good faith acquired countervailing equities due to the mismanagement of the trust property. Any judgment creditor of the trustee has, at common law, a right to seize the trust property on execution, and equity restrains him from so doing solely on the theory that he is interfering with the equitable rights of the *cestui.*[19] But a creditor who bases his claim on the official misconduct of the trustee ought to occupy a better position than a creditor who seeks recovery against the trustee on a liability not incurred in the management of the trust property. Although the court, in *Heystad* v. *Wysiecki,* declared that the right of the beneficiary was not that of a *cestui que trust,* nevertheless, it was a right superior to that of an ordinary creditor, but inferior to that of the plaintiff. A court of equity might, therefore, apply a similar doctrine in the case of express trusts. In this aspect, the question is really one of balancing conflicting equities, and considerations of practical justice seem to demand that the trust fund be made to bear the losses which its creation has made possible.

CONTRIBUTION BETWEEN SURETIES BEFORE JUDGMENT.—The right of contribution between sureties is that right which a surety has, to be reimbursed for a *pro rata* share of any amount which he has paid out on a debt for which he and his co-sureties were severally, or jointly and severally, liable. This right existed by the custom of the City of London[1] although at an early date the law courts refused to recognize it.[2] Soon after this action of the law courts, however, a bill for con-

[17]The courts of Georgia and Pennsylvania have shown a tendency to repudiate the doctrine that the right of the creditor against the trust fund depends upon the trustee's right of exoneration and to base his recovery on principles analogous to those suggested in the text. Wylly *v.* Collins (1851) 9 Ga. 223; Prinz *v.* Lucas (1905) 210 Pa. 620, 60 Atl. 309; see 15 American Law Rev. 449; 59 University of Pennsylvania Law Rev. 250.

[18]See 17 Columbia Law Rev. 467.

[19]See Lewin, *op. cit.,* 250, 275, note *b.*

[1]Layer *v.* Nelson (1687) 1 Vern. 456.

[2]Wormleighton *v.* Hunter (1614) Godb. 243.

tribution between sureties was allowed in equity, based, not on a contract express or implied, but simply on the equitable principle that where two or more persons are primarily subject to the same obligation and one of them pays, the others should contribute their shares.[3] But in the early part of the 19th century the law courts, taking cognizance of the action for contribution between sureties, allowed *indebitatus assumpsit*.[4] In the adoption by the law court of this equitable remedy, however, the restricted formulæ of the common law affected both the theory of the action[5] and the measure of relief.[6] Accordingly, although in equity, in a case where some of the sureties are insolvent or out of the jurisdiction, the amount paid is apportioned between those solvent sureties who can be brought before the court,[7] at law each co-surety is liable only for a share of the sum paid, divided by the number of sureties originally existing, regardless of their ability to pay.[8] Furthermore, it has been held that a suit may be maintained at law without an allega-

---

[3]Fleetwood *v.* Charnock (1629) Nels. Ch. R. 10. "contribution is bottomed and fixed on general principles of justice, and does not spring from contract; although the contract may qualify it". Dering *v.* Earl of Winchelsea (1787) 1 Cox Eq. Cas. 318, at p. 320. "after that principle of equity has been universally acknowledged, then persons, acting under circumstances to which it applies, may properly be said to act under the head of contracts, implied from the universality of that principle." Craythorne *v.* Swinburn (1807) 14 Ves. Jr. 159, at p. 169.

[4]Davies *v.* Humphreys (1840) 6 M. & W. 152; see Turner *v.* Davies (1796) 2 Esp. 479; Cowell *v.* Edwards (1800) 2 Bos. & Pul. 269; *cf.*, Carrington *v.* Carson (N. C. 1801) Conf. Rep. 216, where an action at law was denied.

[5]The form of action allowed was for money paid to the use of another. See cases in footnote 4, *supra*.

[6]"Courts of law, however, although they borrowed their jurisdiction in regard to contribution from courts of equity, and enforced their newly acquired jurisdiction in accordance with common law forms of action, still felt themselves so hampered in the exercise of their newly found powers, that they refused to allow a surety who had paid a debt to recover from his co-surety more than his aliquot or proportional part of the payment thus made". Van Petten *v.* Richardson (1878) 68 Mo. 379, at p. 381.

[7]Peter *v.* Rich (1629) 1 Rep. in Chan. 34; Stewart *v.* Goulden (1883) 52 Mich. 143, 17 N. W. 731; see Trego *v.* Estate of Cunningham (1915) 267 Ill. 367, 108 N. E. 350.

[8]Cowell *v.* Edwards, *supra*; Powell *v.* Matthis (1843) 26 N. C. 83; see Fischer *v.* Gaither (1898) 32 Ore. 161, 51 Pac. 376. "There seems to be a propriety in the rule that where sureties are called upon to contribute, and some of them are insolvent, that all the parties should be brought into court and a decree made upon equitable principles in reference to the alleged insolvency. There should be a remedy decreed against the insolvent parties, which may be enforced if they become afterwards able to pay, and this can only be done in a court of equity when they are parties to the action." Easterly *v.* Barber (1876) 66 N. Y. 433, at p. 440. "There is something very nearly bordering on absurdity in saying to a joint contractor, who has removed the common burden, that he may have his remedy either in a court of equity, or a court of law, but that, if he sues in chancery, he may recover his whole claim, whereas, if he brings his suit at law, he shall recover only a part. The action for money paid is an equitable action; and when a plaintiff has paid money for the benefit of the defendant, he ought not to be driven out of a court of law." Mills *v.* Hyde (1846) 19 Vt. 59, at p. 65.

tion that the principal debtor is insolvent.[9] The better view, however, would seem to be that both at law and in equity, the plaintiff must show the inability of the principal debtor to satisfy the debt.[10] In spite of the assumption by the law courts of jurisdiction over an action for contribution, it has nevertheless been held that equity is not ousted of its jurisdiction;[11] and this would seem especially true where the common-law action fails to give adequate relief.[12]

Since the rights of a surety against his co-sureties rest upon a relational basis, the right to contribution exists even though the surety had no knowledge that there was another surety.[13] Moreover, a release by the creditor to one surety should not absolve him from liability to his co-obligors,[14] and similarly, if the principal debtor has given one surety security for the payment of the debt, such security must be applied for the benefit of all.[15] However, it is essential that the parties shall have become sureties for the same obligation, no right to contribution existing where the obligations are distinct,[16] or where a subsequent surety binds himself to pay the debt, only in case both the principal debtor and his sureties fail to satisfy it.[17] But the parties may by contract vary, as between themselves, the equality of the obligation.[18] Furthermore, if a surety settles a debt for an amount less than its face value, he is entitled only to the proportional amount of that sum for which the obligation has actually been settled,[19] whereas if he pays where no liability existed, he can recover nothing from his fellow surety.[20]

It is often said that a surety cannot call upon his co-surety to contribute until he has paid more than his proportion of the obligation for

[9]Sloo *v.* Pool (1853) 15 Ill. 47; see Smith *v.* Mason (1895) 44 Neb. 610, 63 N. W. 41; Cowell *v.* Edwards, *supra.*

[10]M'Cormack's Adm'r. *v.* Obannon's Ex'rs. (1811) 17 Va. 484; Morrison *v.* Poyntz (1838) 37 Ky. 307; Fischer *v.* Gaither, *supra*; Croy *v.* Clark (1881) 74 Ind. 597. "As the right to contribution is grounded upon the same reasons, both at law and in equity, it seems that the rule should be the same in both jurisdictions." Brant, Surety & Guaranty (3rd ed.) § 316. See Adams *v.* Hayes (1897) 120 N. C. 383, 27 S. E. 47.

[11] Couch *v.* Terry's Adm'r. (1847) 12 Ala. 225; Crowder *v.* Denny (1859) 40 Tenn. 359; Comstock *v.* Potter (Iowa 1916) 158 N. W. 102.

[12]See footnote 7, *supra.*

[13]Warner *v.* Morrison (1862) 85 Mass. 566.

[14]Clapp *v.* Rice (1860) 81 Mass. 557; see Boardman *v.* Paige (1840) 11 N. H. 431; Ward *v.* National Bank (1883) 8 App. Cas. 755. See footnote 20, *infra.*

[15]Steele *v.* Dixon (1881) 17 Ch. D. 825; *In re* Arcedeckne (1883) 24 Ch. D. 709; *contra,* Moore *v.* Moore (1826) 11 N. C. 358. And where a surety surrenders the security, the co-sureties are discharged as against him. Milner *v.* Eskridge (Colo. 1917) 163 Pac. 1115.

[16]Rosenbaum *v.* Goodman (1883) 78 Va. 121.

[17]Craythorne *v.* Swinburn, *supra*; Bulkeley *v.* House (1893) 62 Conn. 459, 26 Atl. 352; Golsen *v.* Brand (1874) 75 Ill. 148; *cf.,* Cooke *v.* ———, (1686) 2 Freem. Ch. 97, which is mentioned in Craythorne *v.* Swinburn, *supra,* but is not followed.

[18]Paul *v.* Berry (1875) 78 Ill. 158.

[19]Stallworth *v.* Preslar (1859) 34 Ala. 505.

[20]Cocke *v.* Hoffman (1880) 73 Tenn. 105. Yet, if a surety is ignorant of a defense he is not barred from recovery. Warner *v.* Morrison, *supra*; Hichborn *v.* Fletcher (1877) 66 Me. 209. If the co-surety knows of a defense to the original action and does not ask the surety sued to interpose it, he should not later in the action against him for contribution be heard to say that the plaintiff was a volunteer. See Skrainka *v.* Rohan (1885) 18 Mo. App. 340.

which they are bound.[21] As a statement of a rule of law this seems unquestionable, for, until payment has been made, there is no basis for an action for money paid to the use of another. In equity, however, although the rule is commonly stated in the same form,[22] its accuracy seems doubtful. It is manifestly just that if a surety pays only his proportion of the debt and the residue is not released, he should not call upon his co-surety who may later be obliged by the creditor to satisfy the balance of the obligation;[23] but where the surety is sued for the full amount of the debt and there is no defense, it would seem that he should be permitted to bring a bill in equity for exoneration and that the chancery court should order the co-sureties to aid in payment.[24] This question is raised by the recent case of *Reeder* v. *Union Trust Co.* (1917) 26 Pa. Dist. R. 833. There the plaintiff's testator and four others were directors of a corporation. A note was made by the corporation and indorsed by all five directors, it being shown that the parties as between themselves were to be co-sureties with equal liability. The corporation becoming insolvent, the holders sued the plaintiff as executrix of one of the sureties. While the suit at law was pending, the executrix brought a bill in equity against the co-sureties for contribution and joined the creditor. The court held that, even though the plaintiff had paid nothing on the note and had not even been sued to judgment, she could maintain her bill, and accordingly decreed that all the solvent sureties join with her in payment.

As some of the earlier cases in equity allowed contribution after judgment but before satisfaction,[25] it would seem that the effect of the judgment is only to ascertain the amount of the obligation.[26] Hence, if the amount due is already known and there is no defense, there would seem to be no difficulty in allowing a bill in equity for contribution before judgment, especially where, because of the insolvency of one of the co-sureties, there is no adequate remedy at law. However, the decree should be so framed that the creditor will not be deprived of his rights or delayed in their enforcement.[27] It is submitted, therefore, that although the case under discussion could be supported upon the narrow ground that an admitted claim against an estate is equivalent to judgment,[28] or that equity in order to facilitate the administration of an estate will grant extraordinary relief, the doctrine of these cases should be admitted in its entirety.

---

[21]Davies *v.* Humphreys, *supra*; Washington, Adm'r. *v.* Norwood (1900) 128 Ala. 383, 30 So. 405.

[22]*Ex parte* Gifford (1802) 6 Ves. Jr. 805. "No right of contribution arises in favor of a co-surety who pays no more than his ratable share of the common burden." Stearns, Suretyship (2nd ed.) § 269. See Brant, *op. cit.*, § 279; Rowlatt, Principal & Surety, 231.

[23]*In re* Snowdon (1881) 50 L. J. Ch. 540.

[24]Wolmershausen *v.* Gullick [1893] 2 Ch. 514.

[25]Morgan *v.* Seymour (1637) 1 Rep. in Chan. 120. Where the surety had paid more than his share and a judgment was taken against him for the balance of the debt, he was allowed his bill for contribution before satisfaction. Hyde *v.* Tracy (Conn. 1807) 2 Day 491.

[26]*In re* Snowdon, *supra*. If a surety pays the debt after judgment but before execution is issued, he can call upon his co-sureties to contribute, Bradley *v.* Burwell (N. Y. 1846) 3 Denio 61, and if the debt is due and there is no defense to be offered, payment before action is brought does not bar a surety's right to contribution. Bright *v.* Lennon (1880) 83 N. C. 183; see Skrainka *v.* Rohan, *supra*.

[27]*Cf.*, Wolmershausen *v.* Gullick, *supra*.

[28]See Rowlatt, *op. cit.*, 233.